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IN THE

Supreme Court of the United States

October Term, 1964

No. 559

EDWARD C. JOHNSON 2D, et al.,
Petitioners,

v.

S. HAROLD LEVITT, Executor,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above entitled case on July 8, 1964.

Jurisdiction

The Petitioners invoke the jurisdiction of this Court under 28 U. S. C. § 1254(1).

The judgment of the Court of Appeals entered in this case is not a final judgment. The judgment of the District Court dismissing the complaint was vacated and the action was remanded for further proceedings not inconsistent with the opinion of the Court (Pet. App. B, p. 40).

This Court has not entertained jurisdiction to review a non-final judgment, such as this one, remanding the case to the District Court for further proceedings, in the absence of some exceptional reason. *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 384 (1893). In *United States* v. *General Motors Corp.*, 323 U. S. 373, 377 (1945), this Court agreed to review the decision because the correctness of the decision of the Court below depended upon the scope and meaning of a provision of the Federal Constitution. In *Land* v. *Dollar*, 330 U. S. 731, 734 (1947), and *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U. S. 682, 685 (1949), this Court entertained the petitions because the Courts below had ruled on the jurisdiction of the District Courts to entertain the actions.

No such compelling reason exists in this case.

Question Presented

Does Respondent's complaint in a derivative action on behalf of his Massachusetts corporation charging only violations of the Investment Company Act of 1940 (15 U. S. C. §§ 80a-1, *et seq.*), and pleading compliance with the procedural requirements of FRCP 23(b), state a claim upon which relief can be granted?

Statutes Involved

The pertinent provisions of Sections 1, 2, 10, 37, 44 and 47 of the Investment Company Act of 1940, 15 U. S. C. §§ 80a-1, 80a-2, 80a-10, 80a-36, 80a-43 and 80a-46 are set forth as Appendix "A" to this brief.

Statement

This is a stockholder's derivative action brought by Respondent, the executor of a deceased stockholder of Fidelity Capital Fund, Inc. (the "Fund"), a Massachusetts corporation, against individuals now or formerly directors of the Fund, the Fund's investment advisor and principal underwriter and another investment company. Respondent seeks an accounting and recovery of money damages for alleged violations of the Investment Company Act of 1940, 15 U. S. C. 80a-1 *et seq.*, hereinafter sometimes referred to as the Act. The Fund, in behalf of which the action was brought, was named a party defendant.

The Fund is registered under the Investment Company Act of 1940 as a diversified open-end management investment company. The shares of the Fund have been and are being offered for sale widely and are sold to the public on a continuous basis.

The individual Petitioners have been the directors of the Fund since its inception in 1959 and, except for Petitioners Brown and Wheeler, have functioned continuously as such directors. Petitioner Johnson is president of the Fund.

The wrongs claimed to have been committed by Petitioners are extensively set forth in the complaint (R., pp. 2-18). The following three paragraphs illustrate, without comprehensively summarizing, the kind of wrongs alleged:

1. The contracts set terms grossly unfair to Fund, and constituted embezzlement in violation of § 37 of the Act, inasmuch as (a) fees were based on a fixed percentage of Fund's net assets, and hence increased in direct proportion to the increase in such assets, (b) fees were at rates higher than those charged by Fidelity Management

& Research Company (hereinafter called FMR) and by others for similar services, and (c) the rates fail to reflect the fact that FMR primarily advises other investment trusts which get much of the benefit of what FMR does for Fund.

2. The contracts were not the result of arm's length bargaining but were adopted as a result of gross negligence of, and disregard of duty by, the directors of Fund. The directors made and renewed these contracts without pressing for a reduction of the rates as assets increased, without adequately considering possible advisors other than FMR, and without seeking a proper allocation among FMR's different clients of the service charges.

3. A majority of Fund's directors have been persons affiliated within the meaning of § 2(a)(3) of the Act, with FMR, and therefore the contracts were in violation of §§ 10(a) and 10(b) of the Act and were null and void under § 47 of the Act.

Most of the wrongs are alleged to have continued until the complaint was filed.

The complaint recites that it would have been futile for plaintiff to make demand upon the Fund's Board of Directors because they are among the alleged wrongdoers (R., p. 15, para. 43). Facts excusing demand upon the stockholders are alleged in paragraph 44 (R., p. 16).

Respondent prayed that the contracts between the Fund and the advisor be declared void; that Petitioners repay to the Fund all investment advisory fees received by them since April, 1959, and that Petitioners account to the Fund for their profits resulting from the matters alleged (R., p. 17).

The complaint also originally pleaded as a pendent claim that the conduct described constituted mismanagement and waste of corporate assets, in violation of Massachusetts law.

In his reply brief in the Court of Appeals (p. 6), the Respondent stated:

> "The plaintiff has, after careful consideration, decided to rest on his basic complaint which asserts a federal claim flowing from violations by the appellees of the Investment Company Act of 1940.
>
> "Therefore, we ask leave to withdraw the pendent claim (complaint, para. 1, A-2) and consent that there be stricken from the complaint (Para. '42', A-15) the following words:
>
> 'and the laws of the state of Massachusetts'
>
> "Thus, there remains for determination only the validity of the federal claim based upon violations of the federal statute."

In connection with this common law cause of action, the Court of Appeals noted in footnote 1 to its Opinion (Pet., App. B, p. 33) the following:

> "The complaint also charged common law violations, but the dismissal of those causes is not complained of."

Proceedings Below

The Petitioner moved in the District Court to dismiss the complaint on the following grounds:

> (I) That the district Court lacks jurisdiction of the subject matter;
>
> (II) That Respondent lacked capacity to bring this action;
>
> (III) That the complaint does not comply with the requirements of FRCP Rule 23(b);
>
> (IV) That the complaint fails to state a claim upon which relief can be granted.

The District Judge overruled the motions addressed to objections numbered I, II and III. He sustained the objection numbered IV and dismissed the complaint.

The District Judge found that the complaint complies with Federal Civil Procedure Rule 23(b) but held that Massachusetts law governs the substantive right of Respondent to present derivatively his corporation's claim. He held that Massachusetts law requires demand upon his fellow stockholders. Absent allegation of such demand, the complaint was insufficient.

The Respondent appealed to the Court of Appeals for the First Circuit. No cross-appeal was filed by Petitioners. The Court of Appeals entered judgment vacating the judgment of the District Court dismissing the complaint and remanded the action to the District Court for further proceedings not inconsistent with its Opinion (Pet., p. 39).

The Court of Appeals found that the District Court had correctly decided that plaintiff had complied with the procedural requirements of FRCP 23(b) and concluded that a rule under which a demand upon the majority stockholders is a condition that cannot be excused in a case such as this is the type of hurdle that the Investment Company Act of 1940 forbids (Pet., p. 39).

Reasons Why the Writ Should Not Be Granted

The Petition does not present "special and important reasons" why this Court should exercise its discretionary power of review. While the questions have significance for the parties, they involve no "principles the settlement of which is of importance to the public, as distinguished from that of the parties" (*Layne & Bowler Corporation* v. *Western Well Works*, 261 U. S. 387, 393 (1923)).

The Petitioners have formulated four questions which they suggest are presented by the record in this case and ought to be reviewed by this Court. We respectfully submit, as we shall show later, that none of the questions presented by the Petitioners are appropriate for review. The only issue decided was one of pleading, and we suggest that we have stated it correctly in our formulation of the question presented (see p. 2, *supra*).

1. The first question formulated and presented by the Petitioners is premised upon an assumption that the law of the Commonwealth of Massachusetts requires a demand upon the body of stockholders before a derivative action may be maintained.

The Court of Appeals in its opinion (Pet., pp. 35-37) concluded that it was not satisfied that the Massachusetts law would require such a demand. The Court of Appeals had before it, fully cited and discussed by the Petitioners in their brief below, all of the Massachusetts cases claimed by them to be pertinent on this question, including the very recent case of *Datz* v. *Keller*, Mass. Adv. Sh. (1964) 491 (see Appellees' brief below, p. 18).

This Court, as a settled practice, places much reliance upon announcements by Courts of Appeals as to the law of the states within their respective circuits. In its opinion in *Spiegel's Estate* v. *Commissioner of Internal Revenue*, 335, U. S. 701 (1949), this Court said (at p. 708), in an opinion by Mr. Justice Black:

> "It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state law" (citing in footnote (3) *Helvering* v. *Stuart*, 317 U. S. 154, 162-165, cf. *Steele* v. *General Mills*, 329 U. S. 433).

Thus, even where there may be a reasonable difference of opinion as to the law of the state, this Court has pursued the policy of leaving undisturbed the Court of Appeals holding on a question of state law.

The Court of Appeals here sustained the sufficiency of the complaint upon the ground that this was a federal cause of action, based upon violations of a federal statute and that the overriding federal law applicable determines the sufficiency of the allegations of the complaint, without regard to the provisions of the state corporation laws.

The Court of Appeals found support for its position in this Court's recent opinion in *J. I. Case Company* v. *Borak*, 84 S. Ct. 1555 (1964) (not yet officially reported).

We submit that this Court's views as expressed in that case enunciated guidelines which the Court of Appeals properly applied. The Petitioners seek to distinguish that case by an effort to narrow the principle there enunciated.

In *Borak, supra*, this Court broadly decided that it is the duty of the federal courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose in federal securities legislation. The sufficiency of a pleading to enforce a federal right should not be tested by a rule narrower in its application than the broad remedies which this Court declares it "is not uncommon for federal courts to fashion * * * where federal rights are concerned." No greater limitation should be attached to the rule of pleading than to the "appropriateness of redress."

The District Court cited in support of its conclusion this Court's decisions in *United Copper Securities Co.* v. *Amalgamated Copper Co.*, 244 U. S. 261 (1917), and *Price* v. *Gurney*, 324 U. S. 100 (1945). The Court of Appeals rejected these cases as distinguishable (see Opinion, Pet., p. 39, footnote 5). In their Petition in this Court, the

Petitioners again urge these cases as cogent authority for their contentions.

The *United Copper Securities Co.* case, *supra*, was a derivative action brought by stockholders of United Copper Securities Co. alleging that certain individuals and corporations had by conduct in violation of the Sherman Act injured United Copper Securities Company. It was an action at law. Neither the directors of United Copper Securities Company nor the company itself were alleged to have participated in the violations. The complaint alleged that demand had been made upon the corporation to bring the action but it had been rejected. There was no allegation that the United Copper Securities Company was controlled by the alleged wrongdoers or that the directors were guilty of any misconduct whatsoever. No application was made to the stockholders as a body; nor did it appear from the complaint that there were any special facts shown which rendered such application unnecessary. The District Court dismissed the complaint and the Court of Appeals affirmed. This Court affirmed the judgment of dismissal on the principal ground that the stockholders in seeking the aid of the court to enforce rights of their corporation could not pursue their remedy in an action at law. This was the main thrust of the decision. In addition, this Court held that the complaint was insufficient because it failed to plead in accordance with the rules which this Court enunciated in *Hawes* v. *Oakland*, 104 U. S. 450 (1882).

In quoting from *Price* v. *Gurney*, *supra*, the Petitioners omit reference to a significant portion of the opinion of Mr. Justice Douglas, in which he states (at p. 105):

> "There is a misconception running through the presentation of this case which should be noted at the outset. It is a misnomer to speak of the filing of the petition on behalf of the corporation as a

> derivative action. A derivative action is a suit by a shareholder to enforce a corporate cause of action. The corporation is a necessary party to the suit. And the relief which is granted is a judgment against a third person in favor of the corporation. * * * the petition which they have filed with the bankruptcy court is not a suit to enforce or protect a corporate right. Nor is it a suit to protect the interests of respondents as stockholders. * * * ''

In view of the foregoing, it can hardly be cited as cogent authority supporting the position of the Petitioners in a derivative action.

2. The second question which the Petitioners suggest is presented by the decision below deals with the propriety of the finding by the District Judge, affirmed by the Court of Appeals, that the complaint complies with the requirements of FRCP Rule 23(b). It should be noted that the Petitioners did not appeal from so much of the judgment in the District Court as denied their motions to dismiss the complaint because it did not comply with the requirements of FRCP Rule 23(b) (R., p. 18, para. 2; p. 19, para. 3; p. 20, para. 2). Having failed to enter such an appeal, the Petitioners ought not to be allowed to raise the question for review for the first time in this Court.

But even on the merits of their argument the Petitioners do not make out a case for review.

The main ground upon which the Petitioners seek review on this point is that the decision below is in conflict with *Haffer* v. *Voit*, 219 F. 2d 704 (6 Cir. 1955) (cert. den'd sub nom. *Ames* v. *Mengel Company*, 350 U. S. 832).

It is also suggested (Pet., p. 11) that this presents a decision on an important question of federal law "which has not been, but should be, settled by this Court."

The Petitioners are in error on both grounds urged.

This Court has long since established guidelines by which to test the sufficiency of the allegations of a complaint in a derivative action. After setting down the pleading requirements in the leading case of *Hawes* v. *Oakland, supra*, this Court adopted Equity Rule 94, which was followed by Equity Rule 27 and is now embodied in FRCP 23(b). In *Delaware & H. Co.* v. *Albany & S. R. Co.*, 213 U. S. 435 (1909), this Court declared that the rule "is intended to have practical operation, and to have that it must, as to its requirements, be given such play as to fit the conditions of different cases." Professor Moore seems to have come to the conclusion that "probably the most straightforward approach is to admit frankly that it lies within the sound discretion of the court to determine the necessity for a demand" (*3 Moore's Federal Practice, 2d Ed.*, Para. 23.19, p. 3525). The District Court cases which Professor Moore cites, relying upon this Court's decision in the *Delaware & Hudson Co.* case, came to the conclusion that it is within the power of the court to decide in every instance upon the facts pleaded as to whether or not a request to secure the action desired would have been an idle ceremony. Judge Leibell in *Cohen* v. *Industrial Finance Corporation*, 44 F. Supp. 491, 494 (S.D.N.Y. 1942), relying upon the *Delaware & Hudson Co.* case, said as follows:

> "Each case should be considered upon its peculiar facts and any arbitrary construction of the Rule, which would result in the emasculation of the equitable considerations that led to its enactment, should be avoided."

Pursuing this view to its logical conclusion, Judge Leibell continued (at p. 495):

> "Whether or not a demand is excused in a particular case is a question for the court [citing cases].

> In passing upon that question the court should consider the whole complaint, not merely the paragraph in which the pleader summarizes the reasons for not demanding action by the directors or stockholders."

A like application of the rule has recently been reflected in the opinion of the Court of Appeals for the Fourth Circuit in *Meltzer* v. *Atlantic Research Corporation*, 330 F. 2d 946 (1964). Judge Bryan cited this Court's decision in the *Delaware & Hudson Co.* case as authority for the sufficiency of a somewhat similar allegation of futility of demand upon the shareholders (at p. 949).

Based upon the *Delaware & Hudson Co.* case, the prevailing view is that in each instance the court of original jurisdiction must satisfy itself upon the facts pleaded in the particular case whether or not a demand is necessary. The Court of Appeals in the instant case took this view in its opinion (Pet., pp. 34, 35) in affirming the correctness of the decision of the District Court that the plaintiff had complied with the procedural requirements of FRCP 23(b).

Thus, there is no conflict in the application of principle of law which this Court is called upon to resolve.

In each of the cases discussed, the court considered the peculiar facts pleaded and came to the conclusion appropriate to the particular case. These differences in appraising the facts pleaded do not constitute "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals" (*Layne & Bowler Corporation* v. *Western Well Works*, 261 U. S. 387, 393 (1923)). This Court has dismissed a Writ of Certiorari as improvidently granted when it appeared that the asserted conflict in decisions arose "from differences in states of fact, and not in the application of a principle of law" (*Wisconsin Electric Company* v. *Dumore Company*, 282 U. S. 813 (1931)).

3. The questions which the Petitioners have suggested in formulations 3 and 4 of the questions presented (Pet., p. 2) are not ripe for decision at this time. They were presented to, and argued in, the Court of Appeals (Pet., p. 5, Appellees' Brief, pp. 44-47 as to question 3; pp. 47-55 as to question 4). That Court declined to consider or decide them (Pet., App. B, p. 33).

This Court has long since pursued the policy of declining to review questions not passed upon below, except in exceptional cases.

In *United States* v. *Fleischman*, 339 U. S. 349, 365 (1950), the Chief Justice, writing for this Court, said: "Respondent advances a number of contentions which were not passed upon by the Court of Appeals. We do not decide them at this time." See also *Larson* v. *Domestic & Foreign Commerce Corporation, supra* (at p. 685); *Owens* v. *Union Pac. R. Co.*, 319 U. S. 715, 724 (1943); *Duignan* v. *United States*, 274 U. S. 195, 200 (1927).

The Petitioners have not made a showing that this is such an exceptional case as to warrant departure from the established rule.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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October, 1964.

APPENDIX A

Statute Involved

INVESTMENT COMPANY ACT OF 1940

Act of August 22, 1940, Chapter 686, Title I, 54 Stat. 789 (15 U.S.C. § 80a-1 *et seq.*).

FINDINGS AND DECLARATION OF POLICY

SEC. 1. [15 U.S.C. § 80a-1.] * * *

* * *

(b) Upon the basis of facts disclosed by the record and reports of the Securities and Exchange Commission made pursuant to section 30 of the Public Utility Holding Company Act of 1935, and facts otherwise disclosed and ascertained, it is hereby declared that the national public —interest and the interest of investors are adversely affected—

(1) when investors purchase, pay for, exchange, receive dividends upon, vote, refrain from voting, sell, or surrender securities issued by investment companies without adequate, accurate, and explicit information, fairly presented, concerning the character of such securities and the circumstances, policies, and financial responsibility of such companies and their management;

(2) when investment companies are organized, operated, managed, or their portfolio securities are selected, in the interest of directors, officers, investment advisers, depositors, or other affiliated persons thereof, in the interest of underwriters, brokers, or dealers, in the interest of special classes of their security holders, or in the interest of other invest-

ment companies or persons engaged in other lines of business, rather than in the interest of all classes of such companies' security holders;

(3) when investment companies issue securities containing inequitable or discriminatory provisions, or fail to protect the preferences and privileges of the holders of their outstanding securities;

(4) when the control of investment companies is unduly concentrated through pyramiding or inequitable methods of control, or is inequitably distributed, or when investment companies are managed by irresponsible persons;

(5) when investment companies, in keeping their accounts, in maintaining reserves, and in computing their earnings and the asset value of their outstanding securities, employ unsound or misleading methods, or are not subjected to adequate independent scrutiny;

(6) when investment companies are reorganized, become inactive, or change the character of their business, or when the control or management thereof is transferred, without the consent of their security holders;

(7) when investment companies by excessive borrowing and the issuance of excessive amounts of senior securities increase unduly the speculative character of their junior securities; or

(8) when investment companies operate without adequate assets or reserves.

It is hereby declared that the policy and purposes of this title, in accordance with which the provisions of this title shall be interpreted, are to mitigate and, so far as is feasi-

ble, to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors.

General Definitions

Sec. 2. [15 U.S.C. § 80a-2.] (a) When used in this title, unless the context otherwise requires—

* * *

(2) "Affiliated company" means a company which is an affiliated person.

(3) "Affiliated person" of another person means (A) any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person; (B) any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; (C) any person directly or indirectly controlling, controlled by, or under common control with, such other person; (D) any officer, director, partner, copartner, or employee of such other person; (E) if such other person is an investment company, any investment adviser thereof or any member of an advisory board thereof; and (F) if such other person is an unincorporated investment company not having a board of directors, the depositor thereof.

* * *

(28) "Principal underwriter" of or for any investment company other than a closed-end company, or of any security issued by such a company, means any underwriter who as principal purchases from such company, or pursuant to contract has the right

(whether absolute or conditional) from time to time to purchase from such company, any such security for distribution, or who as agent for such company sells or has the right to sell any such security to a dealer or to the public or both, but does not include a dealer who purchases from such company through a principal underwriter acting as agent for such company. "Principal underwriter" of or for a closed-end company or any issuer which is not an investment company, or of any security issued by such a company or issuer, means any underwriter who, in connection with a primary distribution of securities, (A) is in privity of contract with the issuer or an affiliated person of the issuer; (B) acting alone or in concert with one or more other persons, initiates or directs the formation of an underwriting syndicate; or (C) is allowed a rate of gross commission, spread, or other profit greater than the rate allowed another underwriter participating in the distribution.

* * *

AFFILIATIONS OF DIRECTORS

SEC. 10. [15 U.S.C. § 80a-10.] (a) After one year from the effective date of this title, no registered investment company shall have a board of directors more than 60 per centum of the members of which are persons who are investment advisers of, affiliated persons of an investment adviser of, or officers or employees of, such registered company.

(b) After one year from the effective date of this title, no registered investment company shall—

(1) employ as regular broker any director, officer, or employee of such registered company, or any person of which any such director, officer, or employee is an affiliated person, unless a majority of the board

of directors of such registered company shall be persons who are not such brokers or affiliated persons of any of such brokers;

(2) use as a principal underwriter of securities issued by it any director, officer, or employee of such registered company or any person of which any such director, officer, or employee is an affiliated person, unless a majority of the board of directors of such registered company shall be persons who are not such principal underwriters or affiliated persons of any of such principal underwriters; or

(3) have as director, officer, or employee any investment banker, or any affiliated person of an investment banker, unless a majority of the board of directors of such registered company shall be persons who are not investment bankers or affiliated persons of any investment banker. For the purposes of this paragraph, a person shall not be deemed an affiliated person of an investment banker solely by reason of the fact that he is an affiliated person of a company of the character described in section 12(d)(3)(A) and (B).

* * *

LARCENY AND EMBEZZLEMENT

SEC. 37. [15 U.S.C. § 80a-36.] Whoever steals, unlawfully abstracts, unlawfully and willfully converts to his own use or to the use of another, or embezzles any of the monies, funds, securities, credits, property, or assets of any registered investment company shall be deemed guilty of a crime, and upon conviction thereof shall be subject to the penalties provided in section 49. A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts.

* * *

JURISDICTION OF OFFENSES AND SUITS

SEC. 44. [15 U.S.C. § 80a-43.] The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. A criminal proceeding based upon a violation of section 34, or upon a failure to file a report or other document required to be filed under this title, may be brought in the district wherein the defendant is an inhabitant or maintains his principal office or place of business. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, his title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended, and section 7, as amended, of the Act entitled "An Act to establish a court of appeals for the District of Columbia", approved February 9, 1893. No costs shall be assessed for or against the commission in any proceeding under this title brought by or against the Commission in any court.

VALIDITY OF CONTRACTS

SEC. 47 [15 U. S. C. § 80-a-46] (a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or with any rule, regulation, or order thereunder shall be void.

(b) Every contract made in violation of any provision of this title or of any rule, regulation, or order thereunder, and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title, or any rule, regulation, or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, regulation, or order.